CHIN TAI v. SIOW SHIOW & ORS.

[F.C. (Ong C.J. (Malaya), Gill and Ali F.JJ.)
October 8, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. 74 of 1970]

Land Laws — Contract — Sale of land — Prohibition against assignment without permission of Collector of Land Revenue — Whether contract illegal — Purchaser not aware of restriction — Specific performance — Damages.

The appellant was the registered proprietor of rubber land in Jelebu. She had agreed to sell it to the respondents, the transfer to be executed on the issue of title. The appellant refused to execute the transfer but applied for recission of the contract, alleging fraudulent misrepresentation on the part of the respondents. The respondents counterclaimed for specific performance and damages. The learned trial judge dismissed the appellant's claim for recission but also dismissed the counterclaim on the ground that the agreement for sale was illegal, as it was an attempt to evade the restriction that the land was not to be transferred without the permission of the Collector of Land Revenue. The appellant appealed.

Held, dismissing the appeal and allowing the counterclaim: (1) on the facts the claim of the appellant for rescission was rightly dismissed;

(2) there was no evidence that the respondents had any fraudulent intention to commit an illegality. The contract of sale was valid although there could be no transfer by way of specific performance without the permission of the collector for the transfer being obtained;

(3) in this case an order may be made for specific performance subject to the permission being granted; if permission is refused, however, the respondents would be entitled to damages.

Cases referred to:-

(1) *Sarjan Singh* v. *Sardara Ali* [1960] M.L.J. 52.

(2) *Malaya Borneo Building Society Ltd.* v. *Ramachandran* [1959] M.L.J. 182.

FEDERAL COURT.

Atma Singh Gill for the appellant.

K. Rajanayagam (*Michael Chong Ngian Fong* with him) for the first and second respondents.

Lee Boon Pang for the third respondent.

Cur. Adv. Vult.

Ong C.J.: The appellant, plaintiff in the court below, is the registered proprietor of approximately 6 acres of rubber land in Jelebu, to which she was given the issue document of title in March 1966. In December 1956 her application for this parcel of State land had been approved. Upon such approval a deposit of $60 required of her was paid to the Land Office on January 27, 1958. The balance of $89.50 in respect of survey fees etc. was settled on February 5, 1959, making a total of $149.50. On April 20, 1961 permission to occupy State land in expectation of title was issued to her.

The land was then under nothing but weeds and lallang. Express conditions for the approval thereof included the planting of certain species of rubber and the taking of proper measures to prevent soil erosion. The plaintiff was an impecunious widow scraping a living as an odd job labourer. She had known the first and second defendants, a married couple who were sundry shopkeepers, for more than 10 years. Unable to make the two payments required by the land office, she said that the monies had to be borrowed by her from the second male defendant. She was thus manifestly unable to afford any expenditure on developing the land.

In the result an agreement in writing was made on April 13, 1960 between the plaintiff and the two defendants — it was drawn by a petition writer, the third defendant — whereby, in consideration of the sum of $149.50 (the amount paid to the Land Office) the plaintiff, as holder of an approved application, agreed to assign all her right and interest in the land to the first female defendant and to execute a valid and registrable transfer thereof in her favour within one month after receipt of the issue document of title. The agreement further provided for the first defendant entering into possession forthwith to use and enjoy the land as she pleased; for payment by the first defendant thereafter of all dues to Government by way of assessment and quit rent; and, in the event of the plaintiff's failure in due course to execute the necessary transfer, for payment of damages for breach of contract, reimbursement of all expenses incurred by the first defendant in developing the said land and refund of the said sum of $149.50.

Pursuant to this agreement the first defendant entered into possession of the land, cleared it of lallang, saw to it that the occupier's obligation to prevent any soil erosion was observed, paid the annual rents, laid out considerable sums of money to plant the approved species of rubber and maintain the land in proper condition until the rubber was mature enough for tapping. At this stage, after the property had become valuable as a profitable source of income, the document of title was issued in March 1966 to the plaintiff. When requested by the first defendant to execute the transfer the plaintiff refused. Instead, she gave notice through her solicitors demanding possession and on August 23, 1966 issued a writ against the three defendants, alleging fraudulent misrepresentation by them, which caused her to execute an agreement the purport and effect of which was contrary to what she was led to believe, and claiming rescission of the said agreement, possession of the land and damages.

Excepting the defence of the third defendant, the pleadings, I regret to say, were prolix, repetitive and argumentative. Briefly, the plaintiff's case was that she had made an oral agreement with the second defendant whereby, in consideration of his advancing the $149.50 for payment to the State Government, he was to be given merely a licence to enter upon the land to plant cash crops for his own use and profit; at the same time he was to plant rubber at his own expense, looking after them until the trees were fully grown, when the land was to be redelivered up to her. Nothing was said or provided for reimbursement of his outlay on developing the property other than refunding him the $149.50.

The statement of claim went on to allege that instructions were subsequently given by the first to the third defendant to reduce the agreement into writing — as an agreement between the plaintiff and first defen-

dant — but the third defendant, in collusion with or by connivance of the first defendant, prepared a sale agreement which was in effect totally different from the contract which the plaintiff had agreed upon with the second defendant.

The first and second defendants by their defence denied that there was any agreement for a licence as alleged; they denied the allegations of fraud and claimed that the agreement of sale executed was in fact in accordance with the true intention of the parties. The first defendant further counterclaimed for specific performance, damages and costs. The third defendant by his defence traversed the allegations of fraud and collusion; he stated that the agreement was drawn in accordance with instructions received from the parties thereto and he had read translated and explained the terms thereof to the plaintiff before its execution.

At the trial the plaintiff called two independent witnesses who had attested the agreement. One was Lim Ang Tiew, a licensed rubber dealer and the other Liew Sin, a cycle repairer. Their evidence not only fell far short of supporting the plaintiff, but rather the contrary. The learned trial judge thought the plaintiff was not telling the truth and on the evidence came to the following conclusion: —

"It is a fair inference that after some time she had decided to give up the land to defendants who had paid the dues in respect of the land. It is in this context that the evidence of the two witnesses to the agreement P9 would appear to fall into place. Lim Ang Tiew said plaintiff did not want the land and wanted to give it to the first defendant. Liew Sin said plaintiff mentioned nothing about the cultivation of bananas and rubber. It is hard to believe that a shopkeeper in the position of the first defendant would go to all the expense of clearing the land and planting it with rubber for the plaintiff in return for nothing more than the dubious privilege of planting some bananas and chillies for herself."

In my view any other conclusion would have been erroneous and against the weight of evidence. In the result the plaintiff's claim was dismissed. She had set out to prove fraudulent misrepresentation and signally failed. By no other means could she have succeeded in having evidence of the oral agreement admitted contrary to the agreement in writing: see sections 91 and 92 of the Evidence Ordinance. The learned trial judge was therefore perfectly correct in dismissing the claim. There is, however, a manifest error in his order as to the costs of the action, due perhaps to an oversight. The first and third defendants had been impleaded purely on the issue of fraud as participants. Costs should normally follow the event, unless there are special circumstances justifying an exception — of which there is no evidence whatsoever or reason given, especially in the case of the third defendant. Notwithstanding that the latter has not cross-appealed it lies within the power of this court to rectify the error: see sub-sections (4) and (5) of section 69 of the Courts of Judicature Act 1964. I would accordingly award him costs of the action.

The plaintiff has now appealed on the ground that the trial judge was in error in refusing to make an order for possession and damages for trespass against the first and second defendants as claimed. Her claim had of course been met squarely by their defence that the written agreement of April 13, 1960 was the true agreement between the parties. On this issue the judge's finding of fact had been entirely in the defendants' favour. There was, however, evidence given in the course of the trial by the collector of land revenue to the effect that the plaintiff's application had been approved subject to a restriction against any dealing by her with the land for 10 years, except with the express permission of the collector — which was never applied for or given when the agreement was made. This restriction is to be seen indorsed on the issue document of title in these terms: —

"The land hereby alienated shall not be transferred, charged or leased for a period of 10 years, except with the express permission in writing of the Collector of Land Revenue, Jelebu."

With this in mind the judge took the view that the agreement was an attempt to transfer the land to the first defendant without the express permission of the collector, in breach of the condition against transfer, so as to attract the provisions of section 127 of the National Land Code 1965. (That section relates to liability for forfeiture for breach of condition). The judge then went on to find that the agreement was entered into for the fraudulent purpose of enabling the first and second defendants to cultivate the land for their benefit while deceiving the administration into believing that the plaintiff was abiding by all the conditions of the alienation of the land to her. Although no reference to such fraudulent purpose appears anywhere in the pleadings, the judge thought that the parties had such purpose in mind; consequently the parties were *in pari delicto* and the loss must lie where it falls. It was simply on this ground that the judge dismissed the counter-claim and made no order as to costs of the action.

This ground of illegality now constitutes the main ground of appeal. It is argued that the plaintiff had not pleaded her own illegality but was relying purely on her own title to the land to recover possession thereof, on the principle laid down in *Sarjan Singh* v. *Sardara Ali*.[1]

This contention is undeniably true had the dismissal of the plaintiff's claim rested on the ground of illegality alone. But it is not so. The judge had, in the first place, found as a fact that the written agreement was the true agreement, upon the plaintiff's failure to prove the alleged fraud. Having sold the land — not parting with it to a licensee — how could she be entitled to repossession thereof? That was clearly his view to be inferred from his reference to the parties being *in pari delicto*.

This very point, however, needs to be scrutinised. With the greatest respect, the dismissal of the counterclaim seems to me erroneous. In point of fact there is a complete lack of evidence showing that the first defendant was ever aware, or made aware by anyone, of the restriction against dealing with the land by the approved applicant. No one is presumed to know the law; least of all, to have knowledge of any particular express condition attached to the grant of an approved application in any particular case. In my opinion there was not an iota of evidence on which the first and

second defendants may properly be imputed a fraudulent intention to commit any illegality. An appeal is by way of rehearing and as already stated, this court has powers under section 69 of the Courts of Judicature Act to make any order which ought to have been given or made, notwithstanding, as here, that the notice of appeal relates only to part of the decision and although any of the respondents or parties has not appealed from or complained of the decision. At the time when the agreement was made the Land Code (F.M.S. Cap. 138) was in force and there is authority for saying that contracts of the type made in this case suffered from no taint of illegality: see *Malaya Borneo Building Society Ltd.* v. *Ramachandran.*[2] Nor, so far as I am able to advise myself, does any such taint attach to the transaction under any of the provisions of the National Land Code 1965. Such being the case, the agreement of April 13, 1960 must be held valid. The only impediment to a transfer by way of specific performance as prayed in the counterclaim, is a requirement of the necessary permission. In the circumstances I think the application for such permission may be made by the first defendant, supported by a copy of this judgment as grounds of her application and by virtue of the agreement. In the event of permission being granted and the plaintiff failing after 14 days of notice received to execute a registrable transfer the Assistant Registrar of this court is to do so in her place and call for surrender of the issue document of title by the plaintiff.

Should permission, however, be refused, the first defendant should be entitled alternatively to damages — being the amount of the first defendant's outlay expended in developing the land. This may be ascertained upon inquiry by the Assistant Registrar, but in order to save costs, we assess the amount of such damages at $7,500, plus the $149.50 advanced. The first and second respondents will also be entitled to the costs of this appeal.

Gill and **Ali F.JJ.** concurred.

Appeal dismissed; Counterclaim allowed.

Solicitors: *Atma Singh Gill & Co.; Michael Chong Ngian Fong & Co.; Lee Boon Peng.*

PUBLIC PROSECUTOR v. STRAITS TIMES (MALAYA) BHD.

[O.Cr.J. (Abdul Hamid J.) October 9, 1970]

[Kuala Lumpur — Criminal Application No. 18 of 1970]

Criminal Law and Procedure — Contempt of Court — Publication in newspaper — Allegation that publication would prejudice and embarrass Public Prosecutor in exercise of his statutory functions and also prejudice fair trial — No pending proceedings.

The Public Prosecutor applied in this case for leave to issue a writ or writs of attachment for contempt of court on the respondents for publication of articles in *The Straits Times.* The grounds upon which relief was sought was that "the publications of the said articles contain matters which are tendencious and constitute contempt of court, because they are prejudicing and embarrassing the applicant in the exercise of his statutory functions and also prejudicing a fair trial concerning the circumstances of the death of one Robert Lee."

Held: (1) there was no valid reason why the applicant should be prejudiced or embarrassed in the exercise of his statutory functions, and it was not alleged that the articles were not fair and accurate reports of an incident which occurred in a public place;

(2) the allegation of prejudice to a fair trial was wholly unrelated to and indeed did not refer to a pending trial and therefore there was nothing in the articles which could be said to be calculated to interfere or obstruct or have a tendency to interfere with or obstruct the due administration of justice.

Cases referred to:-

(1) *Public Prosecutor* v. *Abdul Samad* [1953] M.L.J. 118.

(2) *Re Sin Poh Amalgamated Ltd. & Ors.* [1954] M.L.J. 152 at p. 153.

(3) *In re H.E. Kingdon* v. *S.C. Goho* [1948] M.L.J. 17 at p. 18.

(4) *Ambard* v. *Attorney-General of Trinidad & Tobago* [1936] M.L.J. 117 at p. 119.

(5) *R.* v. *Evening Standard Co.* [1954] 1 Q.B. 578.

(6) *Re Dunn* [1906] Vict. L.R. 403.

(7) *James & Ors.* v. *Robinson* (1963) 109 C.L.R. 593.

CRIMINAL APPLICATION.

Dato Sheikh Abdul Rahman (Mokhtar bin Sidin with him) for the applicant.

M. Shanker for the respondents.

Cur. Adv. Vult.

Abdul Hamid J.: This is an application by the Public Prosecutor asking for leave to issue a writ or writs of attachment for contempt of court on the respondents for the publication of articles in *The Straits Times* on the 25th, 26th and 27th days of August, 1970, under the headings "Assault of engineer; I.G.P. orders probe"; "Doctors fight to save Robert's life" and "Engineer hurt in bar assault dies in hospital" respectively. The grounds upon which the relief is sought —

"are that the publication of the said articles contain matters which are tendencious and constitute contempt of court, because they are prejudicing and embarrassing the applicant in the exercise of his statutory functions and also prejudicing a fair trial concerning the circumstances of the death of one Robert Lee."

These articles are attached to the affidavit of the applicant and it is unnecessary for me to reproduce them here.

Dato Sheikh Abdul Rahman, Senior Federal Counsel appearing for the Public Prosecutor, submitted that these articles embarrass the police and the Public Prosecutor because of the alleged involvement of a police officer, and their effect is to force the hands of the prosecution to take action. He further submitted that they have a tendency to prejudice a fair trial. He pointed out that as death was caused, an inquest will at least have to be held and that means a judicial officer will have to inquire.

The learned counsel said that the word assault used in the articles connotes an unlawful and violent act, and that reference to the commotion suggests that Mr. Lee tried to calm down the crowd. It is argued that the report concerning Mr. Lee's scholastic achieve-